

**UNITED STATES OF AMERICA**  
**NATIONAL LABOR RELATIONS BOARD**  
**FOURTH REGION**

FEDEX GROUND PACKAGE SYSTEM, INC. d/b/a  
FEDEX HOME DELIVERY

Employer

and

Case 4–RC–20974

FXG-HD DRIVERS ASSOCIATION

Petitioner

**SECOND SUPPLEMENTAL DECISION ON CHALLENGED BALLOTS**  
**and**  
**NOTICE OF HEARING ON OBJECTIONS**

Pursuant to a Decision and Direction of Election issued by the Regional Director on June 1, 2005,<sup>1</sup> an election by secret ballot was conducted on June 30 in the unit described in paragraph 5 of the Decision. The ballots were impounded upon the conclusion of the election. The Tally of Ballots, copies of which were made available to the parties at the conclusion of the ballot count on October 12, showed the following results:

Approximate number of eligible voters .....	28
Void ballots .....	0
Votes cast for the Petitioner .....	14
Votes cast against participating labor organization .....	8
Valid votes counted.....	22
Challenged ballots.....	6 <sup>2</sup>
Valid votes counted plus challenged ballots.....	28

The challenged ballots are determinative of the results of the election.

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<sup>1</sup> All dates are in 2005 unless otherwise indicated.

<sup>2</sup> In fact, the ballots of 10 voters were challenged at the election. In addition to the six challenged ballots noted in the Tally, there were also challenges to the ballots of the four multiple route contractors who voted in the election. The Board Agent did not include the challenged ballots of the multiple route contractors in the Tally because a final determination had issued prior to that date finding that they were ineligible to vote in the election. No party objected to the Board Agent's exclusion of these challenged ballots from the Tally. Nonetheless, the basis for finding the multiple route contractors ineligible to vote in the election is set forth in this Decision.

On October 19, the Employer timely filed Objections to conduct affecting the results of the election. A copy of the Employer's Objections is attached as Attachment A.

Pursuant to Section 102.69(c) of the Board's Rules and Regulations, an investigation of the challenged ballots and the Objections was conducted under my direction and supervision. During the investigation, each party was afforded the opportunity to present witnesses and other evidence relevant to the issues raised by the challenged ballots and Objections. The investigation disclosed and the undersigned reports as follows:

### **The Challenged Ballots**

#### *James Hough*

The Employer challenged the ballot of James Hough because his name did not appear on the voting eligibility list. The Employer discharged Hough on or about November 24, 2004. The Petitioner filed an unfair labor practice charge in Case 4-CA-33634 on January 12 alleging that the Employer discharged Hough in violation of Section 8(a)(1) and (3) of the Act. On June 30, 2006, the Regional Director approved the Petitioner's request to withdraw the charge in Case 4-CA-33634. In the absence of any pending unfair labor practice charge over the discharge of this employee, this discharge is presumed to be for cause. See *Spray Sales*, 225 NLRB 1089 (1976) and *Texas Meat Packers*, 130 NLRB 279, 280 (1961). Accordingly, I find that James Hough was not employed by the Employer on the date of the election, and therefore was not an eligible voter. *CWM, Inc.*, 306 NLRB 495 (1992).

#### *The Multiple Route Contractors*

In the Decision and Direction of Election, the undersigned permitted the four individuals who were employed as multiple route contractors to vote in the election subject to challenge. These multiple route contractors were Mike McKenzie, Giacomo Andreoli, Francis Lynch, and Carlon Schaeffer. The Employer requested review of that Decision by the Board. These four individuals appeared at the election and their ballots were challenged. Upon the conclusion of the election, all of the ballots were impounded pending the Board's ruling on the Employer's then pending Request for Review. On August 3, the Board granted the Employer's Request for Review solely with respect to the joint employer and supervisory status of the four multiple route contractors. The Board remanded the case to the undersigned to determine whether the multiple route contractors were joint employers or statutory supervisors. On September 21, the undersigned issued a Supplemental Decision finding that the multiple route drivers were ineligible to vote in the election because they were joint employers and, alternatively, supervisors as defined in Section 2(11) of the Act. No party filed a request for review of the Supplemental Decision. Accordingly, for the reasons set forth in the Supplemental Decision, I find that Mike McKenzie, Giacomo Andreoli, Francis Lynch and Carlon Schaeffer are not eligible voters.

In light of my findings with respect to Hough and the four multiple route contractors, the

five remaining challenged ballots<sup>3</sup> are no longer determinative of the results of the election, and there is no need to resolve the eligibility of these voters.<sup>4</sup>

### **The Employer's Objections**

Based on the evidence submitted during the investigation, I find that the Objections raise substantial and material issues of fact which can best be resolved on the basis of testimony taken at a hearing.

### **CONCLUSION**

Having found that the Objections raise substantial and material issues of fact, I find that a hearing on the Objections is warranted. On January 12, January 31, July 28 and August 29, the Petitioner filed the unfair labor practice charges in, respectively, Cases 4-CA-33635, 4-CA-33672, 4-CA-34047 and 4-CA-34094. These charges allege, *inter alia*, that the Employer engaged in conduct violating Section 8(a)(1),(3) and (4) of the Act. A determination has been made that the charges have merit and a formal Order Consolidating Cases, Consolidated Complaint and Notice of Hearing issued on June 30, 2006. For purposes of efficiency and as these matters involve the same parties, I shall, in due course, order that the Objections be consolidated for hearing with the unfair labor practice charges in Cases 4-CA-33635, 4-CA-33672, 4-CA-34047 and 4-CA-34094.

Signed at Philadelphia, Pennsylvania this 5<sup>th</sup> day of July 2006.

/s/  
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DOROTHY L. MOORE-DUNCAN  
Regional Director, Fourth Region  
National Labor Relations Board

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<sup>3</sup> The ballot of Frank Cucinotti was challenged by the Employer and the Board; and the ballots of Edward Steward, Raymond Skiptunis, Henry Yu and Omaliel Colon were challenged by the Petitioner.

<sup>4</sup> Under the provisions of Sections 102.67 of the Board's Rules and Regulations, a Request for Review of this Second Supplemental Decision may be filed with the Board in Washington, D.C. The Request for Review must be received by the Board in Washington by **July 19, 2006**. Immediately upon the filing of such Request for Review, the filing party shall serve a copy thereof on the other party and shall file a copy with the Regional Director either by mail or by electronic filing to [Region4@nlrb.gov](mailto:Region4@nlrb.gov). See OM 05-30, dated January 12, 2005, for a detailed explanation of requirements which must be met when electronically submitting representation case documents to the Board, or to a Regional Office's electronic mailbox. OM 05-30 is available on the Agency's Web site at [www.nlrb.gov](http://www.nlrb.gov). Under the provisions of Section 102.69(g) of the Board's Rules and Regulations, documentary evidence, including affidavits which a party has timely submitted to the Regional Director in support of its Objections or Challenges and which are not included in the Decision, are not part of the record before the Board unless appended to the request for review or opposition thereto which the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Decision shall preclude a party from relying upon that evidence in any subsequent related unfair labor practice proceeding.